88-147

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

RICHARD L. DUGGER,

Cross-Petitioner,

v.

ROBERT BRIAN WATERHOUSE,

Cross-Respondent.

CROSS-PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PEGGY A. QUINCE
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1313 Tampa Street, Suite 804
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COUNSEL FOR CROSS-PETITIONER

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT HAS MISCONSTRUED THE DECISION IN HITCHCOCK V. DUGGER, 481 U.S. ___, 107 S.CT. ____, 95 L.ED.2D 347 (1987), IN FAILING TO CONSIDER THE APPLICABILITY OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) AS SPECIFICALLY STATED IN HITCHCOCK WHERE THE STATE ARGUED HARMLESS ERROR?

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OTHER AUTHORITIES:

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

RICHARD L. DUGGER,

Cross-Petitioner,

v.

ROBERT BRIAN WATERHOUSE,

Cross-Respondent.

CROSS-PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

The cross-petitioner, Richard L. Dugger, respectfully prays for entry of a writ of certiorari to review the judgment of the Supreme Court of Florida entered in Waterhouse v. Dugger, Case No. 70,459 (Fla. 1988).

OPINIONS BELOW

The opinion of the Florida Supreme Court appears at Waterhouse v. Dugger, 522 So.2d 341 (Fla. 1988), rehearing denied, April 25, 1988.

The decision in Waterhouse's original appeal appears in Waterhouse v. State, 429 So.2d 301 (Fla. 1983), cert. denied, 464 U.S. 977 (1983).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The action arises out of a decision of the Florida Supreme Court for which rehearing was denied on April 25, 1988.

The cross-respondent filed a Petition for Writ of Certiorari in this Court which was received by the cross-petitioner on June 27, 1988.

CONSTITUTIONAL AND

STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, **inter alia** that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Robert Brian Waterhouse was indicted for the first degree murder of Deborah Kammerer. He was found guilty by a jury, and a separate sentencing hearing was held. The jury recommended death, and the trial judge entered an order sentencing appellant to death. On appeal, the Florida Supreme Court affirmed both the judgment and sentence. See, Waterhouse v. State, 429 So.2d 301 (Fla. 1983). Certiorari to the United States Supreme Court was denied. Waterhouse v. Florida, 78 L.Ed.2d 352 (1983).

On February 22, 1985, the governor of the State of Florida signed a death warrant on appellant. On March 15, 1985, a motion to stay execution was filed and the trial judge granted a stay. A Petition for Writ of Prohibition and a Motion to Vacate Stay were filed by the State in the Florida Supreme Court asking the court to

prohibit the trial judge from entering a stay without the filing of an appropriate pleading, such as a 3.850 motion, to invoke the trial court's jurisdiction. That Court denied relief in State v. Beach, 466 So.2d 218 (Fla. 1985).

Subsequently, a motion pursuant to Rule 3.850, Fla. R. Crim. P., was filed and an evidentiary hearing was conducted. The trial judge entered an order denying relief, and on appeal the trial court's decision was affirmed. See, Waterhouse v. State, 522 So.2d 341 (Fla. 1988). That same opinion addressed a state habeas corpus petition filed by the cross-respondent which raised a claim under Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987). A new sentencing hearing was ordered based on Hitchcock without the consideration of harmless error.

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT HAS MISCONSTRUED THE DECISION IN HITCHCOCK V. DUGGER, 481 U.S. __, 107 S.CT. ____, 95 L.ED.2D 347 (1987), IN FAILING TO CONSIDER THE APPLICABILITY OF CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) AS SPECIFICALLY STATED IN HITCHCOCK WHERE THE STATE ARGUED HARMLESS ERROR.

The Florida Supreme Court abrogated its duty to review the instant case in light of a harmless error analysis. This Court in Hitchcock v. Dugger, 481 U.S. __, 107 S.Ct. __, 95 L.Ed.2d 347, 353 (1987), specifically recognized the plausibility of a harmless error analysis when there has been a Lockett violation. And, under Florida law, the court is required to undergo such an analysis. Section 59.041, Florida Statutes, provides:

> "No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper adminis-

> tration or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice. . . ."

Accord, Section 924.33, Florida Statutes.

The court's unwillingness to consider harmless error in the instant case, although argued, mandates reversal and remand to the Florida Supreme Court for further consideration of the facts in light of a Chapman v. California, supra, analysis. See, Pope v. Illinois, 95 L.Ed.2d 439 (1987) [constitutional error, but harmless, in instructions regarding state community standards in consideration of the value question], Rose v. Clark, 92 L.Ed.2d 460 (1986) [impermissible shifting of the burden of proof on an element of the crime in violation of Sandstrom v. Montana, 442 U.S. 510 (1979), found to be constitutional error, but harmless error based on the overwhelming evidence of

guilt.] In Pope v. Illinois, 95 L.Ed.2d at 446, the court explained that "in the absence of error that renders a trial fundamentally unfair, such as denial of a right to counsel or trial before a financially interested judge, a conviction should be affirmed 'where a reviewing court can find that the record developed at trial established guilt beyond a reasonable doubt. . . .' Id, at ___, 92 L.Ed.2d 460, 106 S.Ct. 1301."

While it is necessarily a constitutional violation to restrict consideration of nonstatutory mitigating evidence, Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. __, 90 L.Ed.2d 1 (1986), and Eddings v. Oklahoma, 455 U.S. 104 (1982), said violation does not constitute fundamental error. See, Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987) and Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987) (Hitchcock error evident, however harmless error applied.)

The sentencing hearing in this case occurred in September, 1980. Defense counsels were under no misconception concerning what could be presented to and considered by a capital sentencing jury. However, given the defendant's background and the heinous facts of the case the attorneys for petitioner made a strategic decision not to argue petitioner's character. At the hearing on petitioner's motion pursuant to Rule 3.850, Fla. R. Crim. P., defense counsel made the following statement:

> "I guess the real heart and thrust of the argument was not to take his life, because another life had been taken. That may sound trite, but there wasn't a whole lot to -- you know, were were faced with a monumental problem of his prior first degree murder, and the particular facts concerning this crime."

It is clear that the strategy in this case was to stay away from the specifics.

This was a reasonable tactic considering what was available. At the time

this capital murder was committed petitioner was on parole in New York. That parole was for the brutal murder of a woman in New York. The Florida case was also the brutal murder of a woman. The body of Deborah Kammerer was covered with 30 lacerations and 36 bruises which had been inflicted prior to her death. Her rectum showed evidence of mutilation by multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object; the amount of hemorrhaging demonstrates the rectal mutilation also occurred prior to death. Miss Kammerer's right eye was bruised and blackened and there were multiple injuries to the face. A bloody tampon had been stuffed in her mouth in a manner which prevented her from crying out or screaming. A front tooth was missing and there was evidence indicating this was recent. Furthermore, the

victim had been choked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck.

The Florida Supreme Court's failure to consider harmless error in the case when it has undergone such an analysis in enumerable other cases makes the granting of a new sentencing proceeding arbitrary and capricious. Reversal is mandated in order to allow the court to assess harmless error in light of the facts of the case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the case reversed and remanded to the Florida Supreme Court for further analysis in light of Chapman v. California, supra.

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COUNSEL FOR CROSS-PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

No.

RICHARD L. DUGGER,

Cross-Petitioner,

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ROBERT BRIAN WATERHOUSE,

Cross-Respondent.

CROSS-PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX OF CROSS-PETITIONER

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SUPREME COURT OF FLORIDA

No. 69,557
No. 70,459

ROBERT BRIAN WATERHOUSE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

ROBERT BRIAN WATERHOUSE, Petitioner,

vs.

RICHARD DUGGER, Respondent.

[February 11, 1988]

PER CURIAM

We have before this Court two consolidated cases. One is an appeal from the denial of a motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. The other is a petition for a writ of habeas corpus. Because this case involves the imposition of the sentence of death, following a conviction for first degree murder, this Court has jurisdiction to review both the trial

court order denying relief and the petition for a writ of habeas corpus. Art. V, § 3(b)(1),(9), Fla. Const.

Robert Brian Waterhouse, the appellant and petitioner herein, was found guilty by a jury of the murder of Deborah Kammerer, which occurred on the night of January 2, 1980. Following a jury recommendation of death, the trial court entered an order sentencing him accordingly. On direct appeal, this Court affirmed both the conviction and the sentence of death, Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S. 977 (1983). In February 1985, Governor Bob Graham signed a death warrant on Waterhouse, which execution was stayed by the trial court pending resolution of this rule 3.850 motion. The trial court eventually denied the motion and this appeal, as well as the petition for writ of habeas corpus, followed. For the reasons which follow we

affirm the trial court's denial of post-conviction relief, but grant Waterhouse's writ of habeas corpus.

Dealing with the rule 3.850 motion first, Waterhouse raises on this appeal issues concerning the prosecution's withholding of exculpatory evidence at trial, ineffective assistance of counsel, and the use of a certain past conviction as an aggravating circumstance. Because of our determination in the habeas corpus proceedings, we need not address the issues of the aggravating circumstances, or the allegations of ineffective assistance of counsel at the sentencing proceeding.

Waterhouse alleges that the prosecution violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose the availability of two possibly exculpatory witnesses until the eve of trial, as well as failing to disclose information which would impeach the credibi-

lity of one of the state's chief witnesses against Waterhouse. In the first set of circumstances, the prosecution had in its possession the names of two witnesses who placed the victim, leaving a bar on the night of the attack, with another man who had previously been accused of rape. The prosecutor was aware of the availability of these two witnesses, but claims not to have known the information they possessed was exculpatory to Waterhouse. He states that when he did become aware of the nature of this evidence, he immediately disclosed it to Waterhouse.

Waterhouse's second allegation of Brady violations states that the prosecutor was aware of, and did not disclose, information and reports which would have seriously damaged the credibility of one of the state's leading witnesses, Kenneth Young. Young testified that, while a cellmate of Waterhouse, he had witnessed

Waterhouse attempt to sexually assault another prisoner. He also testified that, after the assault, Waterhouse confessed to Young the details of the Kammerer murder. What the prosecutor allegedly failed to disclose were police reports that Young operated an extortion business while in prison and that Young asked for, and received, favorable treatment in return for testifying against Waterhouse. The state claims that, although the prosecutor did not disclose the police reports to Waterhouse, Waterhouse had already gained possession of the impeaching evidence through other means, and therefore was not prejudiced by the nondisclosure of the report.

In Brady, the United States Supreme Court held that the prosecution is required to disclose all evidence that is favorable to the accused. There is no question that this includes evidence which affects

a witness's credibility as well as evidence tending to negate the defendant's guilt. United States v. Bagley, 473 U.S. 667 (1985). The Court stated that the proper standard for determining a Brady violation is whether there is a reasonable probability that the result would have been different. The term reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. See Bagley, 473 U.S. at 682.

There is no such undermining of confidence in the outcome in this case. As stated, Waterhouse knew of the evidence tending to impeach Young. He simply chose not to use it. Moreover, despite knowing throughout the trial of the two exculpatory witnesses, Waterhouse declined to call one of them, believing that his testimony would do more harm than good. Thus, although it seems clear that the prosecution should have timely disclosed

the information to Waterhouse, it has not been shown that Waterhouse was in any way prejudiced by the nondisclosure, or late disclosure, of the information.

Were it true that the information improperly withheld possessed some value, Waterhouse might have been prejudiced sufficiently to require a reversal based on Brady. However, as any information which may have been improperly withheld was either already in Waterhouse's possession, or it was of little or no use to Waterhouse, we cannot state to any degree of certainty that there is a reasonable probability that the outcome of the trial would have been different. There simply is none of the undermining of confidence in the proceedings necessary to cause a reversal of Waterhouse's conviction.

The second issue concerns allegations that trial counsel was ineffective. As stated, because of our disposition of the

habeas corpus writ, we need not discuss the allegations regarding ineffectiveness during the sentencing proceeding. However, certain arguments regarding ineffectiveness of counsel during the guilt phase of the trial do warrant comment. Waterhouse alleges that his trial counsel was ineffective for failing to investigate to any significant extent the large quantity of expert testimony and technical evidence presented against him. He claims that had counsel effectively done his job, he would have discovered that much of this evidence would have been subject to extensive impeachment. Stated differently, Waterhouse claims that reasonable counsel would have discovered the obvious, and less than obvious defects in the expert testimony and scientific evidence.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court stated that where counsel's defi-

ciencies (if any) result in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. That is to say, counsel has been constitutionally ineffective if his or her "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. Waterhouse must show, in order to succeed in his claim of ineffective assistance of counsel, that counsel's performance was deficient and that Waterhouse was prejudiced by that deficiency.

We believe that counsel's inability to successfully rebut the state's scientific evidence was due more to the quality of that evidence rather than any failure to adequately prepare. We are not convinced, as Waterhouse would have this Court believe, that this technical evi-

dence is so defective that any amount of trial preparation would easily discredit that testimony. Waterhouse is not entitled to perfect or error-free counsel, only to resonably [sic] effective counsel. It is clear from the record that trial counsel made a significant effort to impeach the expert testimony. His inability to do so successfully does not render him ineffective. We find no merit in any of Waterhouse's allegations of guilt-phase ineffective assistance of counsel.

Turning to the petition for a writ of habeas corpus, Waterhouse raises two additional issues. The first, concerning effective assistance of appellate counsel, is rendered moot by our granting the writ based on the second issue. The second issue involves the failure of the trial court to instruct upon, and allow the jury to consider, evidence of nonstatutory mitigating circumstances. This Court has,

since the issuance of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), consistently declined to uphold death sentences where the proceedings violate the teachings of Lockett v. Ohio, 438 U.S. 586 (1978). See Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (consolidated cases); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Morgan v. State, 515 So.2d 975 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987). This case represents another situation where the trial judge did not instruct on, and the jury clearly did not consider, evidence of nonstatutory mitigating circumstances. Here, the jury had the added restriction of the prosecuting attorney telling the jury during closing argument that (consistent with the judge's instructions) the jury should not consider the proffered nonstatutory mitigating evidence because it was not on the statutory "list."

The state argues, as it has in the previous cases, that this Court's decision in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), put to rest the notion that anything more than mere presentment of nonstatutory mitigating factors is required to satisfy Lockett. As we stated in Thompson and Downs, the United States Supreme Court's pronouncement in Hitchcock firmly rejected the concept that mere presentation is enough. It is not what the lawyer thought could be presented that is important. Rather, what is important is what the jury was permitted to consider in making its recommendation to the court. Here, as in the prior cases, it is abundantly clear that the jury was not permitted to consider proffered evidence of relevant, nonstatutory mitigating circumstances. At the sentencing proceeding, Waterhouse proffered evidence that he suffered from

alchoholism and was under the influence of alchohol the night of the murder. He also presented evidence that despite the difficulties of being a severely abused child, he was a well behaved child until he suffered a severe head injury allegedly resulting in organic brain damage. The jurors should have been allowed to consider these factors in mitigation, but were told by both the judge and the prosecutor that it could not. For these reasons a reweighing of the aggravating and mitigating factors is required.*

Accordingly, we grant the writ of habeas corpus, vacate the sentence of death imposed upon Waterhouse, and remand this case to the trial court for a new sentencing proceeding before a jury, consistent with this opinion and the requirements of

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* Because the state declined to argue that the error complained of was harmless, we will not pass judgment on that issue.

Lockett and Hitchcock. We affirm the trial court's denial of Waterhouse's rule 3.850 motion.

It is so ordered.

OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur
McDONALD, C.J., Concurs in part and dissents in part with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, C.J., concurring in part and dissenting in part.

I would deny all relief. Considering that Waterhouse has a prior second-degree murder conviction, was on parole when this offense was committed, that this crime was committed in the course of committing sexual battery and was especially cruel, atrocious, and heinous when compared with the limited value of the proffered and available nonstatutory mitigating evidence, causes me to unhesitatingly find that any Hitchcock error was harmless error beyond a reasonable doubt and that the alleged deficiency in presenting additional nonstatutory mitigation fails to meet the second prong of the Strickland test.

TWO CONSOLIDATED CASES:

An Appeal from the Circuit Court in and for Pinellas County,

Robert E. Beach, Judge - Case No. CRC 80-192 CFASO

and An Original Proceeding - Habeas Corpus

Stephen B. Bright, Clive A. Stafford Smith and Julie Edelson, Atlanta, Georgia,

for Appellant/Petitioner

Robert A. Butterworth, Attorney General, and Peggy A. Quince and Candance M. Sunderland, Assistant Attorneys General, Tampa, Florida,

for Appellee/Respondent

IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE, Petitioner, v. RICHARD DUGGER, ETC., ET AL., Respondents.	)	Case No. 70,459

MOTION FOR REHEARING

COMES NOW the Respondent, by and through the undersigned assistant attorney general and requests rehearing of the habeas petition. In support of this motion Respondent says:

I.

This Court issued its opinion in this cause on February 11, 1988, granting a writ of habeas corpus and ordering a new sentencing hearing before a jury. The court did not pass on the issue of harmless error stating the state had declined to argue harmless error. Respondent sub-

mits the court has overlooked the fact that harmless error was discussed at length during oral argument on September 3, 1987.

During the argument counsel for Respondent was specifically questioned concerning whether or not harmless error was being asserted. There ensued a recitation of why harmless error was in fact applicable under the facts and circumstances of this case.

II.

The sentencing hearing in this case occurred in September, 1980. Defense counsels were under no misconception concerning what could be presented to and considered by a capital sentencing jury. However, given the defendant's background and the heinous facts of the case the attorneys for petitioner made a strategic decision not to argue petitioner's character. At the hearing on petitioner's mo-

tion pursuant to Rule 3.850, Fla. R. Crim. P., defense counsel made the following statement:

> "I guess the real heart and thrust of the argument was not to take his life, because another life had been taken. That may sound trite, but there wasn't a whole lot to -- you know, we were faced with a monumental problem of his prior first degree murder, and the particular facts concerning this crime."

(Record in Case No. 69,557, at p. 947)

It is clear that the strategy in this case was to stay away from the specifics.

This was a reasonable tactic considering what was available. At the time, this capital murder was committed petitioner was on parole in New York. That parole was for the brutal murder of a woman in New York. The Florida case was also the brutal murder of a woman. The body of Deborah Kammerer was covered with 30 lacerations and 36 bruises which had been inflicted prior to her death. Her rectum showed evidence of mutilation by

multiple tearing wounds. Scientific evidence indicated the victim had been anally assaulted with a penis and a foreign object; the amount of hemorrhaging demonstrates the rectal mutilation also occurred prior to death. Miss Kammerer's right eye was bruised and blackened and there were multiple injuries to the face. A bloody tampon had been stuffed in her mouth in a manner which prevented her from crying out or screaming. A front tooth was missing and there was evidence indicating this was recent. Furthermore, the victim had been choked to such an extent as to cause hemorrhages in the eyes, lining of the voice box and muscles of the neck.

III.

Although this Court has ordered new sentencing hearings in a number of cases where the jury instructions on mitigating circumstances were virtually identical to

those found wanting in Hitchcock v. Dugger, 481 U.S. __, 107 S.Ct. __, 95 L.Ed.2d 347 (1987), there are other cases where harmless error has been found even with the same instructions. See, Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987) and Booker v. Dugger, 13 F.L.W. 33 (Case No. 70,928, Opinion filed January 14, 1988).

The mitigating evidence in this case was meager. The aggravating circumstances were numerous and points out the atrociousness of this capital murder. As this Court said in Booker v. Dugger, supra., when discussing the possibility of a jury recommendation of life

> There was simply no nonstatutory mitigating evidence sufficient to offset the aggravating circumstances upon which the jury could have reasonably predicated such a recommendation. We are also convinced beyond a reasonable doubt that the judge would have sentenced Booker to death regardless of the jury's recommendation and that an override would have been consistent with the rationale of

Tedder v. State, 322 So.2d 908 (Fla. 1975).

The aggravation in this particular case was overwhelming.

IV.

There are two Florida statutes which require a harmless error analysis before a judgment or sentence is set aside. Section 59.041, Florida Statutes, provides:

> **59.041 Harmless error; effect**
>
> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Section 924.33, Florida Statutes, also provides:

> **924.33 When judgment not to be reversed or modified.** -- No

> judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

An examination of the total record in this case clearly demonstrates the erroneous instruction was harmless error. Petitioner not only committed a heinous murder but he had also previously committed a brutal murder. A sentence of death, even after a jury recommendation of life, would have been sustainable under Tedder.

WHEREFORE, for the foregoing reasons Respondent requests rehearing in this case on the issue of harmless error.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 88-147

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RICHARD DUGGER,

Cross-petitioner,

vs.

ROBERT BRIAN WATERHOUSE,

Cross-respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Cross-respondent, ROBERT BRIAN WATERHOUSE,, who is now held on death row at the Florida State Prison in Starke, Florida, asks leave to file the accompanying Brief in Opposition to the State's Cross-Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

Mr. Waterhouse's affidavit in support of this motion is attached hereto. He was granted leave to proceed in forma pauperis in the courts below, as well as in the state courts of Mississippi prior to bringing this post-conviction action.

Respectfully submitted,

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185 Walton Street, N.W.
Atlanta, GA 30303
(404) 688-1202

Counsel for Mr. Waterhouse

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

No. 87-7328

ROBERT BRIAN WATERHOUSE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, ROBERT BRIAN WATERHOUSE, being duly sworn, hereby depose and state that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions herein relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I am confined on death row at the Florida State Prison, at Starke, Florida.

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes _____ No ✓

b. Pensions, annuities or life insurance payments?

Yes _____ No ✓

c. Rent payments, interest or dividends?

Yes _____ No ✓

d. Gifts or inheritances?

Yes _____ No ✓

e. Any other sources?

Yes ✓ No _____

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: Inmates does not have receipts. Exact amount not known.

3. Do you own any cash, or do you have money in a checking or savings account? Yes ✓ No ____ (Include any funds in prison accounts) If the answer is yes, state the total value of the items owned: [redacted] $52.55.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ____ No ✓ If the answer is yes, describe the property and state its approximate value:

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: None.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated June 23, 1988.

Robert Brian Waterhouse
ROBERT BRIAN WATERHOUSE

Subscribed and sworn to before me this 23 day of June, 1988.

L. A. Saunders
NOTARY PUBLIC

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Mar. 24, 1991

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of $52.55 on account to his credit at the Florida State Prison where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of this institution: NONE

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Authorized Officer

No. 88-147

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

RICHARD L. DUGGER,

Cross-Petitioner,

vs.

ROBERT BRIAN WATERHOUSE,

Cross-Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Attorneys for Mr. Waterhouse

* Counsel of Record

QUESTION PRESENTED

Whether this Court should grant certiorari to consider whether jury instructions which unconstitutionally limited the jury's consideration of mitigating circumstances at a capital trail were harmless when the Florida Supreme Court declined to address the issue because of the failure of the cross-petitioner to present the issue in his brief to that Court?

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STATEMENT OF THE CASE

Mr. Waterhouse was convicted of murder and sentenced to death in Pinellas County, Florida, in September, 1980. At the sentencing phase of the trial, the court instructed the jury that it was to consider as mitigating factors only those set out in Fla. Stat. 921.141 (6). Record on Appeal 2296. The prosecutor emphasized in his closing argument that mitigating factors were limited to the statutory list. With regard to evidence which had been presented about Mr. Waterhouse's alcohol problems, the prosecutor argued: "Is that a mitigating factor? I didn't see anything about alcohol [on the statutory list]."

On petition for habeas corpus relief in the Florida Supreme Court, Mr. Waterhouse argued that he was entitled to relief under this Court's decision in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987), because "it could not be clearer that the advisory jury was instructed to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings, therefore, did not comport with Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978)." Hitchcock, 95 L.Ed.2d at 353. The State, representing the respondent warden, argued that there was no Hitchcock violation.

The Florida Supreme Court held that the sentencing proceedings violated Hitchcock:

> This case represents another situation where the trial judge did not instruct on, and the jury clearly did not consider, evidence of nonstatutory mitigating circumstances. Here, the jury had the added restriction of the prosecuting attorney telling the jury during closing argument that (consistent with the judge's instructions) the jury should not consider the proffered nonstatutory mitigating evidence because it was not on the statutory "list."

Waterhouse v. State, 522 So.2d 341, 344 (1988); Appendix to the

Cross-Petition for Certiorari at A-11. The Florida Supreme Court also found that the unconstitutional instructions prevented the jury from considering important mitigating evidence:

> . . . Here, as in prior cases, it is abundantly clear that the jury was not permitted to consider proffered evidence of relevant, nonstatutory mitigating circumstances. At the sentencing proceeding, Waterhouse proffered evidence that he suffered from alcoholism and was under the influence on the night of the murder. He also presented evidence that despite the difficulties of being a severely abused child, he was a well behaved child until he suffered a severe head injury allegedly resulting in organic brain damage. The jurors should have been allowed to consider these factors in mitigation, but they were told by both the judge and the prosecutor that it could not. For these reasons a reweighing of the aggravating and mitigating factors is required.

522 So.2d at 344; Appendix at A-12-A-13. The Court also observed that the State had failed to argue that that error was harmless:

> Because the state declined to argue that the error complained of was harmless, we will not pass on that issue.

522 So.2d at 344 n. *; Appendix at A-13 n. *. The State argued harmless error for the first time in its petition for rehearing, which was denied on April 25, 1988.

REASONS FOR DENYING THE WRIT

I. THE HARMLESS ERROR ISSUE WAS NOT PROPERLY PRESENTED TO THE COURT BELOW AND IS NOT WORTHY OF PLENARY REVIEW BY THIS COURT

This Court should deny the cross-petition for certiorari because the State has failed to show "that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgement on certiorari." Supreme Court Rule 21.1(h). The State did not and cannot comply with this Rule because the harmless error assertion it seeks to present here was not raised prior to the decision of the Florida Supreme Court and that Court relied upon the State's procedural default in refusing to address the issue:

> Because the state declined to argue that the error complained of was harmless, we will not pass on that issue.

522 So.2d at 344 n. *; Appendix at A-13 n. *. It is well established that where a state court declines to address an issue in reliance on its own procedural default rules, a federal court will not decide the constitutional issue. Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986).

The Florida Supreme Court did not "misconstrue" this Court's decision in Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987), as asserted by the State. Instead, it did exactly the same thing this Court did in Hitchcock:

> Respondent [Dugger] has made no attempt to argue that this error was harmless, or that it had not effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 95 L.Ed.2d at 353. The Florida Supreme Court is well aware of the applicability of the harmless error standard to Hitchcock violations as demonstrated by its finding of harmless error in other cases involving Hitchcock errors. See, e.g., Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987).

In addition, the harmless error issue belatedly asserted by the State does not present an important issue worthy of consideration by this Court by way of certiorari. The issue presents none of the considerations governing review by certiorari set out in Supreme Court Rule 17. As previously shown, the Florida Supreme Court has correctly applied the harmless error standard in other cases and there is no suggestion that other state or federal courts are in need of guidance from this Court on this issue. Moreover, this case would not be an appropriate one in which to address the issue of harmlessness since the Florida Supreme Court has already found that in this case it "abundantly clear that the jury was not permitted to consider proffered evidence of relevant, non-statutory mitigating circumstances." 522 So.2d at 344, Appendix to Cross-Petition at A-12. Finally, the question of whether a constitutional violation is harmless is "a question more appropriately left to the courts below." Connecticut v. Johnson, 460 U.S. 73, 102 (1983) (Powell, J., dissenting).

Accordingly, the cross-petition for certiorari should be denied.

CONCLUSION

For the reasons previously stated, this Court should deny the cross-petition for certiorari.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served by mail upon Assistant State Attorney General Peggy Quince, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, this 24th day of August, 1988.